United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7530

To be Argued by
JOSEPH CARDILLO, JR.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Arbitration

-between-

PETROLEUM TRANSPORT, LTD.,
Owners of the IONIAN CHALLENGER,
Petitioner-Appellant,

-and-

YACIMENTOS PETROLIFEROS FISCALES,
Charterers,

Respondent-Appellee.

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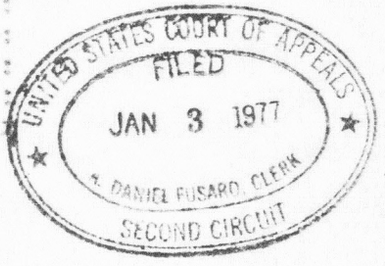

BRIEF FOR APPELLANT

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In the Matter of the Arbitration

-between-

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BRIEF FOR APPELLANT

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Statement of the Case

This is an appeal from an order by the Honorable Charles H. Tenney, Judge of the District Court for the Southern District of New York, denying the petition of appellant, Petroleum Transport, Ltd., for an order vacating the award made by the arbitrators in this matter, confirming part of the findings made by said arbitrators, and remanding the matter to the arbitrators, or in the alternative, for an order vacating the award in toto on the grounds that the arbitrators were guilty of misconduct in refusing to hear

evidence pertinent and material to the controversy and that the arbitrators so imperfectly executed their powers that a final and definite award was not made.

The proceedings in the District Court were commenced on or about February 6, 1976, by the filing of a Petition with said Court. On or about September 21, 1976, Judge Tenney filed a Memorandum and Order denying the Petition in all respects. The appellant filed its Notice of Appeal on or about October 21, 1976.

Statement of Facts

Reference is hereby made to the facts as set forth in the Petition filed with the District Court. For the sake of convenience, the pertinent facts are condensed below.

The appellant, Petroleum Transport, Ltd., a Liberian corporation, was the Owner of the vessel IONIAN CHALLENGER ("Petroleum"). The appellee, Yacimentos Petroliferos Fiscales of Argentina is an organization formed under authority of the Government of Argentina and an arm of the said government engaged in the chartering of vessels for the carriage of petroleum to Argentina ("YPF").

On or about September 4, 1973, Petroleum and YPF entered into a charter party agreement covering the vessel IONIAN CHALLENGER for a voyage for the carriage of petroleum in bulk from the Persian Gulf to La Plata, Argentina, which

agreement provided for the submission to arbitration in New York of any controversy between the parties and that judgment may be entered upon the award of the arbitrators.

Immediately thereafter and on September 5, 1973, a dispute arose between the parties, Petroleum claiming that the rate at which it was induced to fix the vessel was a result of false representations by YPF and therefore resulted in an action for deceit. The false representations consisted of the fact that in the midst of negotiations YPF represented to Petroleum that it had chartered three named vessels at the rate of WS370. Misled by this information Petroleum accepted the rate of WS370. The following morning it was found that YPF had not chartered two of the vessels named and that in fact it had chartered the remaining one, the MINA, at the rate of WS400. (Appendix p. 4 and Affidavit of Joseph Cardillo, Jr., sworn to January 31, 1976, ¶6 et seq). Petroleum claimed that as a result of such deceit it suffered basic damages in the sum of $88,966.00, and sought said amount, together with punitive damages in a like amount, as well as interest, and the costs and expenses of the arbitration including reasonable attorneys' fees.

Pursuant to the arbitration clause of the charter agreement, the parties each named an arbitrator and the two so named appointed Arthur E. Ferris as the third arbitrator.

The arbitrators held hearings and received evidence

both parties appearing.

The parties through their respective counsel agreed to conduct the arbitration under the Rules of the Society of Maritime Arbitrators (the SMA rules).

On October 10, 1975, the third arbitrator wrote to counsel for both parties advising that the Panel had made its determination in the case and "is prepared to submit its award". It further stated that the "award will be released upon payment of the arbitrators' fees" which they assessed against YPF at a total of $7[illegible]00.00. (Appendix p.19)

Prior thereto counsel for Petroleum had received additional evidence which was felt to be of considerable importance to the Panel and on or about November 3, 1975, long before any award was issued or delivered, requested that another hearing be held so that the said evidence could be presented to the Panel or, alternatively, whether the Panel would prefer the evidence in documentary form. The delay in the request for a further hearing was due to the illness suffered by counsel for Petroleum (See Appendix p. 17). On the same date Mr. Ferris, the Panel Chairman, telephoned to counsel for YPF and informed him that at the request of Petroleum's counsel another hearing would be held.

Upon receiving said advice counsel for YPF acknowledged the decision to hold another hearing and he wrote to the arbitrators requesting the right to hold a further hearing

in order to present rebuttal witnesses after receipt of the printed transcript of Petroleum's witness' testimony (Appendix, p. 21).

Three days later, counsel for YPF wrote a further letter purporting to object to the proposed hearings.

On November 24, 1975, although no award had yet been issued, published or delivered, counsel for both parties were advised by letter that the Panel had certain doubts in the circumstances, and accordingly requested each counsel to submit a memorandum of law showing whether the Panel had the right to hold further hearings. It fixed a time limit of December 15, 1975 for the submission of the memoranda of law. In the letter requesting the memoranda, the Panel assured the parties that no award would be released pending its decision whether it had the right to hold the hearings (Appendix p. 22).

On the following day, to wit, November 25, 1975, Petroleum's counsel received a copy of a letter addressed to each of the arbitrators from counsel for YPF which letter to the arbitrators apparently enclosed checks in payment of the arbitrators' fees as fixed in Mr. Ferris' letter of October 10, 1975.

In the interim Petroleum's counsel, in compliance with their request, did in fact submit a substantial memorandum of law under date of December 11, 1975, clearly showing

that the Panel not only could but was obliged to hold the requested hearings both under the law and the S.M.A. rules governing the arbitration.

Despite its request for the said memoranda and notwithstanding his statement in his letter of November 24th in which he advised counsel that no award would be released, Mr. Ferris, the Chairman of the Panel, wrote an undated letter to counsel for the parties, received by Petroleum's counsel on December 2, 1975, stating that the Panel acknowledged receipt of the arbitrators' fees and that "in accordance with the letter of 10 October 1975, it is required to release its award in the captioned matter." The award was enclosed with the said letter and is dated the 24th day of October 1975 (Appendix p. 2).

In its award the Panel found that there had been a misrepresentation and that YPF not only was aware of it but was prepared to take advantage of it. It thereupon concluded on page 5 of its "award" that YPF

> "will pay all costs of this arbitration including arbitrators' fees, stenographic fees and claimant's reasonable attorney fees, with interest thereon at 7% commencing one month after same have been submitted to YPF."

The Panel did not request the expenses or costs of the transcripts, or the expenses and disbursements incurred by Petroleum's attorneys, nor did it fix their fees in any way,

(which, in any event, could not have been determined at that time since services were still being performed as requested by the Panel), thus making the award unenforceable or at best interlocutory. It failed, despite the finding of deceit, to award Petroleum the damages, on which issue the request for the hearing, or introduction of documentary evidence had been made.

Under date of December 11th Petroleum's counsel wrote to the arbitrators enclosing the memorandum requested by the Panel on November 24th and advising that it had received the "award" but for the reasons expressed in the memorandum Petroleum had no choice but to treat the same as an interim award pending a further hearing and advising that failing such the Owners would have no alternative but to move to set aside the award.

ARGUMENT

Point I

THE DISTRICT COURT ERRED IN HOLDING THAT THE ARBITRATORS WERE NOT GUILTY OF MISCONDUCT WHEN THE RECORD SHOWS THAT THEY REFUSED TO HEAR EVIDENCE PERTINENT AND MATERIAL TO THE CONTROVERSY IN VIOLATION OF TITLE 9 U.S.C. §10(c) AND OF THE RULES UNDER WHICH THE ARBITRATION WAS CONDUCTED

Section 10 of Title 9 U.S.C., provides in relevant part:

> "[T]he United States court in and for the district wherein the award was made may

> make an order vacating the award upon the application of any party to the arbitration -
>
> (a) * * *
>
> (b) * * *
>
> (c) Where the arbitrators were guilty of mis-conduct in refusing . . . to hear evidence pertinent and material to the controversy."

Moreover, Section 25 of the Rules of the Society of Maritime Arbitrators, which rules by agreement of counsel governed the arbitration at issue, provides in part:

> "The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator(s) may deem necessary to an understanding of the dispute."

In the instant case, Petroleum sought to introduce evidence relating to the issue of damages before an award was issued. The evidence would have shown that the River Plate market rate for vessels comparable to the IONIAN CHALLENGER was distinct and not controlled by the market rate elsewhere. More specifically, the evidence would have shown that subsequent to the fixture of the IONIAN CHALLENGER, which YPF accomplished by falsely representing that it had chartered another vessel, the MINA, at WS370, YPF chartered a number of other vessels many for WS490 and at least one for as much as WS500, at a time when the market rate elsewhere was dropping. Those facts have a direct bearing on Petroleum's damages and may, in fact, entitle it to more

than had been requested. Indeed, a basic assumption made by the arbitrators in the award released was that the River Plate market and the general market were identical (Appendix p. 4).

Therefore, it is respectfully submitted that the evidence Petroleum sought to offer was "necesary to a proper understanding and determination of the dispute."

Furthermore, it is clear under Section 25 of the S.M.A. rules that the arbitrators not only had the power to hold a further hearing but that Petroleum had the right to present the additional evidence. Even if all hearings had been closed (and there was never any such indication), Section 30 of the S.M.A. rules provides in relevant part:

> "the hearings may be reopened by the Arbitrator(s) on his own motion or upon the application of a party for good cause shown at any time before the award is made."

Petroleum's application to reopen the hearings (had they been closed) was timely and for good cause. First, it was for good cause as indicated above. Second, it was timely because the request was made before the arbitration panel issued any award.

The law has long been settled in this country that the authority of an arbitration panel to reopen the dispute submitted to it and to conduct further hearings continues until a final, valid and enforceable award is delivered

in accordance with the method agreed on submission of the dispute. Byars v. Thompson, 2 Leigh (39 Va.) 550, 37 Am. Dec. 680 (1841); Williams v. Rumbough, 5 Lea (75 Tenn.) 606 (1881); Sturges on Commercial Arbitrations and Awards 544 (1930); cf. Citizens Bldg. v. Western Union Tel. Co., 120 F.2d 982, 984 (5th Cir. 1941). The arbitrators may make up their own minds as to their decision and may even set their decision down on paper. Their duties are not complete until the award is delivered to the parties in accordance with the terms of submission. Rusnak v. General Controls Co., 7 Cal. Repts. 71, 72 (Ct. of App. 1960).

Applying that rule to the facts in the instant case, it is apparent that no award was delivered to the parties prior to Petroleum's request to hold a further hearing. Thus since Section 36 of the S.M.A. rules provides for the legal delivery of the award to the parties by mailing a true copy thereof or by personal service of the award, the arbitrators had the power to "reopen" the hearings.

Indeed, the facts show that the arbitrators herein decided to "reopen" the hearings but then proceeded to release the award before Petroleum could present the above-described evidence despite its right to present such evidence under Section 25 of the S.M.A. rules.

Both by his letter dated October 10, 1975, and in his letter of November 24, 1975, Mr. Arthur Ferris, the arbi-

tration panel's chairman, advised counsel for the parties that no award would be released until receipt of fees in the first letter and of memoranda in the second (Appendix pp. 19 and 22).

The letter dated November 3, [illegible], by counsel for YPF, Mr. Pendleton, to Mr. Ferris (Appendix p. 20) is clear evidence of the arbitration panel's decision to grant Petroleum's request and "reopen" the hearings. At the very outset of that letter Mr. Pendleton states:

> "In your telephone call of today you informed me that at the request of Mr. Cardillo the record will be re-opened for oral testimony from a ship's broker."

In that letter Mr. Pendleton did not question the power of the arbitrators to reopen the hearings and indeed requested that he be allowed to present rebuttal evidence at a further hearing, stating:

> "Of course, we request the right to present a rebuttal witness after we have received the printed transcript of Mr. Cardillo's witness testimony."

By subsequent letter dated November 6, 1975, for some inexplicable reason Mr. Pendleton reversed his position and expressed his concern "about the proposed reopening" of the hearings.

In his reply letter of November 24, 1975, Mr. Ferris declared the Panel incapable of deciding the issue whether

the Panel had the power to "re-open" the hearing without the benefit of briefs from the parties, emphasizing that no award would be released pending their decision on that issue. Mr. Ferris wrote the following:

> "Whether the signed but unreleased award made in this case completed the Panel's function so that it no longer has any jurisdiction to re-open would seem to us to be a legal question, not determinable by this Panel without receiving a legal memorandum on the subject.
>
> * * *
>
> Pending Arbitrators' decision as to re-opening the award will not be released."

It is apparent from the contents of that letter and from the fact that initially the Panel had agreed to reopen the hearings that the request contained in Mr. Ferris' letter of October 10, 1975, for YPF to pay the arbitrators' fees assessed against it, had been abrogated. The duty of YPF and Petroleum and their respective counsel was at that point, as outlined by the Panel, to prepare and submit briefs on the question whether the Panel had become functus officio.

Before December 15th, the deadline set by the arbitrators, however, YPF exhibiting an alacrity which it had not shown up until then, sent checks to the arbitrators in full payment of their fees.

The arbitrators acknowledged receipt of YPF's checks,

and without yet having reviewed the memoranda they requested, released an award in complete disregard of Mr. Ferris' letter of November 24, 1975. The arbitrators explained that having been paid their fees they had become functus officio.*

A recent case, Cofinco, Inc. v. Bakrie & Bros. N.V., 395 F. Supp. 613 (S.D.N.Y. 1975), is peculiarly applicable to this matter in more than one respect, and was completely disregarded by the Court below. The said case involved a petition to confirm an arbitrators' award and a cross motion to vacate it. The dispute arose out of a contract for delivery of coffee, the petitioner claiming that the coffee was contaminated and the respondent interposing a procedural defense that the claim was time barred. The arbitration was conducted under the Rules of the Green Coffee Association which provide for an initial arbitration before a panel of three arbitrators and the right of appeal to a board of five arbitrators. The initial arbitration panel held for the respondent, stating that the claim was indeed time barred. The Petitioner appealed to the five member panel. The

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* The Panel's view in this respect was clearly erroneous. Indeed, according to that view, if the Panel were paid in advance (as is sometimes the case under the American Arbitration Association rules), they would be functus officio before hearing any evidence.

appellate panel reversed the original decision and held for the petitioner and awarded the petitioner "all monies paid for the coffee" without specifying amounts and also gave the petitioner various "'accrued expenses' (e.g., for insurance, entry charges, demurrage) and interest 'at the average prime rate,' all to be paid within 30 days." (395 F. Supp. at 615).

The court first considered the issue of whether the appellate panel had reached a decision without considering all the pertinent evidence. It appeared that at the time the disputes went before the panel of first instance, the counsel for respondent stated that if the proceeding were not to be time barred, he would expect an evidentiary hearing at which petitioner would be put to his proof. However, the chairman of the panel acknowledged the request and the panel adjourned to consider the threshold question, and adjourned that portion of the hearings in which petitioner would produce further evidence. As the matter developed there was no occasion for the panel to reconvene and hear further evidence since the respondent prevailed on the statute of limitations question.

Since the Rules of the Green Coffee Association provided that an appeal shall not constitute a new trial, and that the appeal shall be considered solely on the record, the appellate panel provided for under the said Rules could not take any new evidence on the merits. The five member appeal

board, nevertheless, by a vote of four to one, reversed the decision below, and went on to decide for petitioner on the merits, part of its findings being quoted above.

The language of the court on this point is of particular interest. The court stated at page 615:

> "The appeals panel made a final ruling on questions that had been expressly postponed below, where it had recognized -- as the Panel would have been required to recognize in any event -- that the basic right to present and test evidence on issues of fact had not been accorded. There was never occasion to hear this evidence in the first instance. The appellate panel was barred from receiving it and did not purport to receive it. The panel of five merely purported to decide without leaving an opportunity for the evidence to be heard at either level. The result of the short circuit effected on appeal was a basic species of arbitral 'misconduct' -- 'in refusing to hear evidence pertinent and material to the controversy * * *.' 9 U.S.C. §10(c). It makes no difference that the appellate panel may have acted only in neglectful disregard rather than by explicitly 'refusing' to hear the evidence. The fundamental right to be heard was grossly and totally blocked."

The court vacated the award, stating at page 616:

> "While the award must be vacated, it should be deemed final in one respect. As noted above, the appellate tribunal had power to reverse, and obviously did reverse the ruling that this was a time barred quality arbitration. No sound ground is suggested and the court perceives none, for nullifying that determination. The result of today's decision, therefore, will be a remand for a hearing at the nisi prius (three-member) stage into the questions of fact and law on the merits that have not thus far been fairly heard anywhere. See 9 US.S.C. §§10(d) and (e), 11(b).

Applying the holding of that case to the instant facts, it is evident that in failing to reopen the hearings, the arbitrators were guilty of misconduct and were in violation of §10(c) of the Federal Arbitration Act and §25 of the S.M.A. rules. As happened to the petitioner in Cofinco, Petroleum's attempt to introduce evidence "pertinent and material to the controversy", was "short-circuited" by improper conduct on the part of the arbitrators. After deciding to "reopen" the hearings, and announcing that they would not release their award, the arbitrators nevertheless, without waiting for the requested briefs and without hearing the evidence which in the first instance they had considered worthy of being heard, released their so-called award.

Petroleum respectfully submits that the District Court's failure to find the arbitrators guilty of misconduct was based on certain findings of fact and conclusions of law which are clearly erroneous. Furthermore, the lower Court omitted several facts from its opinion which render its conclusions faulty.

The District Court stated the following at page 6 of its decision:

> "The arbitrators were well within their rights in rendering the award over eight months after the hearing was initially closed and after Petroleum had had ample opportunity to submit further documentation prior to the award."

The hearing which the lower Court apparently makes reference to is the second hearing of the arbitration. At the close of that hearing, the Panel explicitly left the record in expectation of further evidence to be submitted by the parties. Thus, the Panel Chairman stated at the conclusion of the hearing as follows:

> "Both parties having stated that they have no further evidence to submit, other than that which will be forthcoming by mail and will not be a part of the transcript, this hearing is closed at approximately 4:35 p.m. on the 3rd of February."

Obviously, the reference to closing was as to that hearing only. There was no indication that further hearings were not to be held and, in fact, that Panel did order one as indicated above.

On March 10, 1975, counsel for YPF wrote that he considered the record closed. Counsel for Petroleum, upon receipt of a copy of that letter, wrote the arbitrators that the attorney in charge of the case had suffered a heart attack, was under intensive care, and that he had indicated prior to being taken ill that he had further material to submit to the arbitrators (Appendix p. 17). As a result, the record was kept open and although Petroleum's post-hearing memorandum was filed on July 2, 1975, argument on evidence submitted subsequent to that date was accepted by the arbitrators as late as October 2, 1975 (Opposing affi-

davit of George C. Pendleton, sworn to May 12, 1975, p. 3).

The lower Court erred, therefore, in attaching any significance to the comment regarding closing of the hearing of February 3, 1975, and it further erred in finding that Petroleum had had ample opportunity to submit further evidence. As a result of his sudden and unexpected illness and the prescribed period of recovery, the attorney in charge of the case for Petroleum did not come into complete knowledge of the new evidence which Petroleum sought to submit until late in October (Appendix p. 17 and Petition, ¶10).

Immediately upon learning of the full impact of the new evidence, counsel for Petroleum contacted the Panel Chairman to hold another hearing and the arbitrators decided to reopen the hearings. The lower Court ignored the fact that the Panel never indicated that it felt Petroleum "had had ample opportunity to submit further documentation", as it stated in its Memorandum decision, and, also ignored that, in fact, the Panel specifically decided to hold a further hearing when initially requested to do so. It was only when counsel for YPF, reversing himself, objected to the further hearing, after not only agreeing thereto but in turn requesting a further hearing, that the Panel questioned its authority to hold the hearing and asked the parties to brief the issue.

It is important to emphasize that the issue which pre-

vented the Panel from holding the hearing right then and there never was whether Petroleum had had the opportunity to submit the evidence it sought to submit. The issue was whether by announcing that it had reached a determination, the Panel had become functus officio. By initially deciding to hold a further hearing, the Panel had indicated its willingness to hear the evidence and had by implication decided that it was relevant to their determination contrary to the lower Court's additional finding that the evidence which Petroleum sought to introduce was not "pertinent or material to the controversy."

On the other hand, when the Panel decided to release its award, it did so only because it felt it had become functus officio upon the payment of the arbitrators' fees by YPF. Certainly, there was no decision by the arbitrators, express or implied, that Petroleum had had ample opportunity to introduce the new evidence or that the evidence was not pertinent or material to their determination. Thus, the findings by the lower Court that Petroleum had had ample opportunity to introduce the new evidence and further that the evidence itself was not pertinent or material are unwarranted by the facts and therefore erroneous.

The purpose of introducing the evidence was primarly to show that the River Plate market was not controlled by the market rate elsewhere. While the latter market dropped

the former did not. As it turned out, the evidence sought to be introduced would have directly questioned the assumption made by the arbitrators in their award that the two markets were identical.

Petroleum, therefore, respectfully requests that, in accordance with the disposition made by the court in the Cofinco case, this Court affirm the Panel's finding of deceit and remand the case to the arbitration panel to hear evidence solely on the question of damages, and on the question of expenses which issue as will appear from Point II, infra, was not properly decided by the Panel.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT THE AWARD WAS MUTUAL, FINAL, AND DEFINITE WITHIN THE MEANING OF TITLE 9U.S.C. §10(d) DESPITE THE FACT THAT THE ARBITRATORS AWARDED COSTS AND ATTORNEYS' FEES TO PETROLEUM BUT FAILED TO FIX THE ACTUAL AMOUNT AWARDED.

A fatal defect in the award here involved lay in the fact that it failed to fix the amount assessed against YPF - a point which the Court below completely overlooked, except to acknowledge that the award was imperfectly executed in that regard.

Title 9 U.S.C. §10 provides that an award may be set aside when the arbitrators have so imperfectly executed their powers that a "mutual, final and definite award" has not been made.

The arbitrators in the instant case assessed all costs of the arbitration against YPF, including Petroleum's reasonable attorneys' fees, with interest thereon at 7%, interest commencing one month after same have been submitted to YPF. The arbitrators, however, did not fix any amounts on which judgment could be entered. It is

settled law that an award which is indefinite is null and void. Cofinco, Inc. v. Bakrie & Bros. N. V., supra; Mtr. of Overseas Distrs. (Benedict Bros.), 5 A.D. 2d 498 (1958); Pyramid Prod. Inc. v. Nat. Telefilm Assoc. Inc., 40 Misc. 2d 675 (1963); In Re E. A. Laboratories, Inc. 50 N.Y.S. 2d 222, 227 (1944); 6 Corpus Juris Secundum §1115(b), p. 353.

In the Cofinco case, supra, the facts of which were related under Point I hereof, the Court, in referring to the decision of the appellate arbitration panel, dealt with the issue of the completeness of the award. In that respect the Court stated, at page 616:

> "Having proceeded beyond its proper competence, and lacking an evidentiary record sufficient for a sound and complete resolution, the appeals panel also managed to exercise its powers 'so imperfectly * * * that a mutual, final and definite award upon the subject matter submitted was not made.' 9 U.S.C. §10(d). The goal of the proceeding was, and remains, a money award. It is not sufficient to leave open matters like 'accrued expenses,' interest, and the like, which could entail large sums and disagreements confided to the arbitral jurisdiction. Unless items like these are handled by agreement of the parties, the arbitrators should hear them, taking relevant evidence as needed, and decide them, not leave them for decision somewhere else or at some other time.

It appears therefore that under the ruling of that Court, either the award herein should be set aside in its entirety or that the Panel's decision that deceit did actually occur be confirmed and that the matter be referred back to the arbitrators for the introduction of evidence solely on the question of the expenses of arbitration and on damages which the Panel had originally agreed to permit.

That conclusion is supported by still another case, Mtr. of Overseas Distrs. (Benedict Bros.), supra. In that case the award was attacked, among other grounds, on the basis of finality and conclusiveness of the award. There the Court stated at page 499:

> "We recognize that an award may be deemed to be final if all that remains to be done are ministerial acts or arithmetical calculations. Where a formula for computation is so clear that the amount to be paid is merely an accounting calculation, then there is a definite determination of the rights of the parties and the award is final and enforcible. (Matter of Hunter [Proser], 274 App. Div. 311, affd. 298 N.Y. 828). But the award herein leaves open the amount which appellants are obligated to pay, reserves certain other matters to the taking of subsequent oaths and requires a deposit of funds in accordance with the books of one of the parties. These directions are not only indefinite, but the determination

> of the amounts depends upon more than just arithmetical calculations. Businessmen and accountants can well disagree as to what a set of books shows as being 'due' to a party. An award must be clear to indicate unequivocally what each party is required to do. (See Matter of Pfeiffer, Inc., 222 App. Div. 62)."

And again at page 500:

> "The order below should therefore be modified, on the law, to the extent of vacating the award as to appellants Downtown Exchange, Inc. and Alfred Benedict, with costs to said appellants; denying the application to confirm the award and directing that the matter be resubmitted to the same arbitrators to fix the obligations of the parties in a definite manner. * * * If the books of Overseas are to fix an amount which may be due, those books should be examined by the arbitrators and the amount determined."

It is evident that the arbitrators in the instant case did not fix or determine an amount to be awarded and therefore the award herein is unenforceable. *

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* Indeed, it should be noted that the arbitrators could not have fixed a definite amount of attorneys' fees to be awarded Petroleum, because at the time the arbitrators released their award counsel for Petroleum were preparing the brief requested by the Panel in their letter of November 24, 1975, and consequently the services had not yet been concluded.

Apparently the lower Court recognized the problem but inexplicably failed to correct it, finding that the award "except for the computation of attorneys' fees chargeable to YPF, was 'mutual, final, and definite' within the context of 9 U.S.C. §10(d). In view of the "exception" the obvious and inescapable conclusion is that the award was not "mutual, final and definite" as required by the statute This incongruity noted but left unresolved by the District Court must be corrected by this Court by either vacating the award or remanding to the arbitrators with instructions to set the attorneys' fees and other costs chargeable to YPF.

CONCLUSION

It is respectfully submitted that the finding of deceit by the arbitration panel should be confirmed, the hearings should be reopened, the additional evidence should be received, and the arbitrators should make a final and definitive award as required by 9 U.S.C. §10 incorporated into the Rules of the Society of Maritime Arbitrators, or in the alternative the award should be set aside *in toto*.

Dated: New York, New York
December 30, 1976.

Respectfully submitted,

CARDILLO & CORBETT,
Attorneys for Petitioner

Joseph Cardillo, Jr.
Tulio R. Prieto,
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Arbitration

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-and-

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Charterers,
Respondent-Appellee.

76-7530

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

TULIO R. PRIETO, being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over 18 years of age and resides at 39-45 51st Street, Woodside, N. Y. 11377.

2. On December 30, 1976, deponent served, Two copies of the within Brief for Appellant and Appendix upon Hill, Betts & Nash, attorneys for the appellee in this appeal, at One World Trade Center, Suite 5215, New York, N. Y. 10048, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Tulio R. Prieto
Tulio R. Prieto

Sworn to before me this
30th day of December 1976.

Lucia Ferraro

LUCIA FERRARO
Notary Public, State of New York
No. 24-6277685
Qual. in Kings Co. Cert. Filed N.Y. Co.
Commission Expires March 30, 19__

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,
CARDILLO & CORBETT

Attorneys for

Office and Post Office Address
29 Broadway
Borough of Manhattan New York, N. Y. 10006

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19
at M.
Dated,

Yours, etc.,
CARDILLO & CORBETT

Attorneys for

Office and Post Office Address
29 Broadway
Borough of Manhattan New York, N. Y. 10006

To

Attorney(s) for

Index No. 76-7530 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Arbitration
-between-
PETROLEUM TRANSPORT LTD.,
Owners of the IONIAN CHALLENGER,
Petitioner-Appellant,

-and-

YACIMENTOS PETROLIFEROS FISCALES,
Charterers,
Respondent-Appellee.

AFFIDAVIT OF SERVICE

CARDILLO & CORBETT

Attorneys for Appellant.

Office and Post Office Address, Telephone
29 Broadway
Borough of Manhattan New York, N. Y. 10006
344-0464

To

Attorney(s) for

Service of a copy of the within
is hereby admitted.

Dated,

.....

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath